IN THE COURT OF APPEALS
STATE OF GEORGIA

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| JENNA MILES, | : | |
| | : | |
| Appellant, | : | |
| v. | : | DOCKET NO. A24A1332 |
| | : | |
| STEPHEN H. KAHLER, M.D. AND TANNER MEDICAL CENTER, et al, | : | (From State Court of Carroll County STCV2021000904) |
| | : | |
| Appellees. | : | |

# REPLY BRIEF

COMES NOW, Jenna Miles, Appellant in the above-styled action and Plaintiff below, and files this Reply Brief.

## Correction of Appellant's Factual Statements

Throughout their Brief, Appellees repeatedly assert that Ms. Miles read the informed consent document and understood all the risks involved in the procedure. This is stated as if it were an undisputed fact. It is not. In truth, it is a fact *issue* that a jury must decide, based on contrary evidence presented by Appellant.

Specifically, Appellees make the following unsupported assertions:

- "She acknowledged that she **read, understood**, signed and initialed each page of a four-page informed consent for breast reduction surgery." (*Appellees' Response Brief* at 3.)
- "Plaintiff does not dispute and cannot undo the fact that she did **read, understand,** initial, and sign the informed consent to her surgery

acknowledging she was explained the specific risks, benefits, and alternatives of her surgery." (*Brief* at 8.)

- "She acknowledged the information had been explained to her in a way that she understood, there may be alternative procedures or methods of treatment, and received in substantial detail further explanation of the procedure or treatment, other alternative procedures or methods or treatment, and information about the material risk of the procedure or treatment. (VS-134-37)" (*Brief* at 3.)
- "Plaintiff admits she **was made aware** and had a general awareness of **all of the risks** of surgery and alternatives. (V5-49.)" (*Brief* at 7.)
- All medical experts in the case agree that Dr. Kahler properly showed Plaintiff before and after breast reduction surgery pictures of other patients showing a range of different results from better to worse. [1] (*Brief* at 3)

Ms. Miles initialed and signed the documents, but it is not undisputed that she read and understood them, and in fact she testified affirmatively that she did *not* read and understand them. See *Miles dep.* at 38, 109. Furthermore, Appellees have produced no evidence contradicting Ms. Miles' testimony that no one discussed the specific risks at issue before presenting the documents or when instructing her to sign them. Neither Dr. Kahler nor Nurse Reeves can recall any details regarding her signing the informed consent forms. See, e.g., *Kahler dep.* at 35, *Reeves dep.* at 57.

[1] But, Appellees admitted, none showed severe scarring. *Kahler dep.* at 141-142.

Appellees cite to Jenna Miles' deposition testimony for the proposition that she "read and understood" the specific risks of the procedure. This is misleading. A careful review of the transcript reveals nothing more than Counsel reading paragraph after paragraph from the informed consent documents, and Ms. Miles acknowledging that, yes, that's what it says, and yes, she *does* understand and *could have* understood it, but not that she read it at that time and understood it at the time. The most Ms. Miles admitted was that she knew that there were risks, generally, and some were gone over in more detail (specifically, the possible inability to breast feed, which is not relevant here). And, of course, Ms. Miles also testified that Dr. Kahler explicitly downplayed the specific risk of scarring.

## I. Ms. Miles oral statements are sufficient to create a jury issue as to whether the presumption of notice was rebutted.

In claiming that Ms. Miles testimony is ineffective to avoid summary judgment, Appellees quote a sentence from *Beach v. Lipham*, 276 Ga. 302, 578 S.E.2d 402 (2003), that "the presumption of law does not vanish simply because the opposing party introduces some evidence contrary to the presumption. Beach v. Lipham, 276 Ga. 302, 304 (2003)." This is an incomplete statement of the law. The full paragraph from *Beach*, including the critical second sentence, reads as follows:

> Under Georgia law, a rebuttable presumption of law generally does not vanish when the opposing party introduces evidence contrary to the presumption. [Cit.] As Professor Milich explains in his treatise on Georgia evidence, "it does not matter how much counter evidence the

> opponent has presented to rebut the presumed fact, **the presumption remains alive through jury instructions and can only disappear if the jury decides to discount it.**"

(Emphasis supplied.) *Beach v. Lipham*, 276 Ga. 302, 304, 578 S.E.2d 402 (2003) (citing Paul S. Milich, *Georgia Rules of Evidence* § 5.3, at 48-49 (2d ed. 2002)).

Whether Ms. Miles read the informed consent document (she testified she didn't), whether it was explained to her (she testified it wasn't), and whether, moreover, Dr. Kahler gave her information and assurances directly contrary to what was in the informed consent document (she testified he did[2]) are jury issues. Yes, the presumption does remain alive, but it is up to the jury, not the Court, to decide whether it was sufficiently rebutted.

## II. Appellant's affidavit is not barred by the *Prophecy Corp.* doctrine.

Appellees argue that Ms. Miles' affidavit testimony that "had [she] known the degree of scarring that [she] experienced was possible, [she] would not have chosen to proceed with the breast reduction at that time" is barred under *Prophecy Corp. v. Charles Rossignol, Inc*., 256 Ga. 27, 343 S.E.2d 680 (1986). That case and its progeny hold that, to be barred, the testimony must be directly contradicted by other sworn deposition testimony. See, e.g., *Coca-Cola Co. v. Nicks*, 215 Ga. App. 381, 450 S.E.2d 838 (1994) (and hundreds of other cases). Ms. Miles deposition testimony that she "may have thought about it a lot harder before proceeding

[2] See *Miles dep.* at 34-35, 111, 141-142; *Amended Verified Complaint*, R-93.

forward had [she] known" does not directly contradict her affidavit, as it might had she testified unequivocally that she would have gone forward. Furthermore, this testimony must be considered in light of the fact that she was not given the alternative of liposuction reduction (at the time or, within the question posed to her), and that this was another form of breast reduction with which she may have indeed chosen to "proceed forward."

For these reasons and the reasons stated in Appellant's Response Brief, Appellees' Motion for Partial Summary Judgment should be denied.

*I hereby certify that this submission does not exceed the word count limit imposed by Court of Appeals Rule 24(f).*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the above and foregoing REPLY BRIEF upon opposing counsel in the above-styled case by U.S. Mail First Class, and by e-mail to:

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This the 8th day of July, 2024.

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